SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 7 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 321

W. E. McCULLOCH, Auditor of Polk County, Iowa, and HAROLD E. HUGHES, Governor of State of Iowa, GARY L. CAMERON, Secretary of State of State of Iowa, LORNE R. WORTHINGTON, Auditor of State of Iowa, PAUL FRANZENBURG, Treasurer of State of Iowa, KENNETH E. OWEN, Secretary of Agriculture of State of Iowa, in Their Elective Capacities and Also Collectively and Individually As the Executive Council of the State of Iowa, and LAWRENCE F. SCALISE, Attorney General of State of Iowa, and ROBERT D. FULTON, Lieutenant Governor of State of Iowa,

Petitioners,

vs.

ELIZABETH KRUIDENIER, ROBERT R. RIGLER, LaMAR FOSTER, SR., and THOMAS S. HEFLEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

LAWRENCE F. SCALISE
Attorney General of Iowa
TIMOTHY McCARTHY
Solicitor General of Iowa
State Capitol
Des Moines, Iowa
Counsel for Petitioners

R. L. MERIDETH, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Opinions Below 2
Jurisdiction 2
Questions Presented 3
Statutes Involved 4
Statement of Case 4
Reasons for Granting the Writ 12
Appendix A: Opinions of District Court Below A1
Appendix B: Opinion of Supreme Court Below A28
Appendix C: Chapter 88, Acts of 61st G.A. (Iowa 1965) A72
Appendix D: Iowa Constitutional Provisions—
Article I, Section 6 ..... A95
Article III, Section 37 ..... A95
Article III, Section 34 ..... A95
Article III, Section 35 ..... A95
Article III, Section 36 ..... A96

Citations

I. CASES:

A. SUPREME COURT CASES:

Baker v. *Carr*, 369 U.S. 186 (1962) 33
Berea College v. *Kentucky*, 211 U.S. 45, 53 (1908) 21
Burnett v. *Davis*, 86 S. Ct. 181 (1965) 18
Burns v. *Richardson*, 34 U.S.L.W. 4365 (1966) 16, 18, 29, 33, 35, 36, 37
Drew v. *Scranton*, 229 F. Supp. 310, reversed 379 U.S. 40 (1964) 14, 15, 16, 36

Enterprize Irrig. Dist. v. *Farmer's Mutual Canal Co.*, 243 U.S. 157 (1917) 22, 32
Flournoy v. *Wiener*, 321 U.S. 253 (1943) 28
Fortson v. *Dorsey*, 379 U.S. 433 (1965) 15, 16, 18, 34, 36, 37
Fox Film Corp. v. *Muller*, 296 U.S. 207 (1935) 21, 22
Fox River Paper Co. v. *Railroad Comm'n*, 274 U.S. 651 (1927) 30
Herb v. *Pitcairn*, 324 U.S. 117 (1945) 21
Irwin v. *Dowd*, 359 U.S. 394 (1959) 27
Jankovitch v. *Toll Road Comm'n*, 379 U.S. 487 (1965) 27
Lucas v. *Forty-Fourth Colorado General Assembly*, 377 U.S. 713 (1964) 15, 16, 34, 36
Mental Hygiene Dept. v. *Kirchner*, 380 U.S. 194 (1965) 21
Minn. v. *National Tea Co.*, 209 U.S. 551 (1940) 26, 28
Missouri ex rel. South. R. Co. v. *Mayfield*, 340 U.S. 1 (1950) 26
Murdock v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1874) 22
New York City v. *Central Savings Bank*, 306 U.S. 661 (1938) 28
Reynolds v. *Sims*, 377 U.S. 533 (1964) 11, 14, 16, 30, 34, 36, 37
State Tax Commission v. *Van Cott*, 306 U.S. 511 (1939) 22, 26-27
Swann v. *Adams*, 86 S. Ct. 767 (1966) 19
Thornton v. *Davis*, 86 S. Ct. 181 (1965) 18
Utley v. *St. Petersburg*, 292 U.S. 106 (1934) 31
Vandalia R.R. v. *Ind. ex rel. City of South Bend*, 207 U.S. 359 (1907) 22
Ward v. *Board of County Comm'rs*, 253 U.S. 17 (1920) 22

Wilson et al. v. *Loew's, Inc.*, 355 U.S. 597 (1958) 21
Woods v. *Nierstheimer*, 328 U.S. 211 (1946) 31
Wright v. *Rockefeller*, 376 U.S. 52 (1964) 16
Yancey v. *Faubus*, 251 F.Supp. 998, Aff'd 86 S. Ct. 933 (1966) 18

B. LOWER FEDERAL COURT CASES:

Baker v. *Carr*, 247 F.Supp. 629 (M.D. Tenn. 1965) 24
Davis v. *Cameron*, 238 F.Supp. 462 (S.D. Iowa 1965) 5, 6, 15
Davis v. *Synhorst*, 225 F.Supp. 689 (S.D. Iowa 1964) 10, 11, 23
Sims v. *Baggett*, 247 F.Supp. 96 (M.D. Ala. 1965) 24
Stout v. *Bottorff*, 246 F.Supp. 825 (S.D. Ind. Ind. 1965) 15, 24

C. STATE COURT CASES:

Butcher v. *Bloom*, 415 Pa. 438, 203 A.2d 556 (1964) 14, 27
Dickinson v. *Porter*, 240 Iowa 393, 35 N.W.2d 66 (1949) 29, 34
Faber v. *Loveless*, 249 Iowa 593, 88 N.W.2d 112 (1958) 34
Selzer v. *Synhorst*, 253 Iowa 936, 113 N.W.2d 724 (1962) 9, 30
Steinberg-Baum & Co. v. *Countrymen*, 247 Iowa 923, 77 N.W.2d 15 (1956) 28
White v. *Anderson*, 394 P.2d 333 (Colo. Sup. Ct. 1964) 24
Williams v. *Carr*, Tenn. Sup. Ct., 5-16-66 24
State of Iowa ex rel. Wright v. *Board of Health*, 233 Iowa 872, 10 N.W.2d 561 (1943) 34

II. CONSTITUTIONAL PROVISIONS:

Sec. 1, Amendment 14, U. S. Constitution 11, 12, 20, 27
Art. III, Sec. 6, Iowa Constitution 4, 12, 20, 25, 27
Art. III, Sec. 37, Iowa Constitution 4, 8, 11, 23, 25, 26
Art. IX, Sec. 197-203, Constitution of Alabama 26
Art. V, Sec. 47, Colorado Constitution 26
Art. 4, Sec. 6, Indiana Constitution 26
Art. II, Sec. 6, Tennessee Constitution 26

III. STATUTES:

Chapter 371, Acts of the 60th General Assembly (Iowa 1963) 11
Chapter 88, Acts of the 61st General Assembly (Iowa 1965) 4, 11

IV. MISCELLANEOUS:

Hart & Wechsler, The Federal Courts and Federal System, 443 (The Foundation Press, Inc. 1953) 28
Note, Supreme Court Disposition of State Decisions Involving Nonfederal Questions, 49 Yale L. Jr. 1463 (1940) 28
Note, The Untenable Nonfederal Ground in the Supreme Court, 74 Harvard Law Review, 1375 (1965) 22, 31
McKay, Reapportionment (Twentieth Century Fund, Inc. 1965) 35
Iowa R. Civ. P. 344 (7) (1962) 31

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. .....

W. E. McCULLOCH, Auditor of Polk County, Iowa, and HAROLD E. HUGHES, Governor of State of Iowa, GARY L. CAMERON, Secretary of State of State of Iowa, LORNE R. WORTHINGTON, Auditor of State of Iowa, PAUL FRANZENBURG, Treasurer of State of Iowa, KENNETH E. OWEN, Secretary of Agriculture of State of Iowa, in Their Elective Capacities and Also Collectively and Individually As the Executive Council of the State of Iowa, and LAWRENCE F. SCALISE, Attorney General of State of Iowa, and ROBERT D. FULTON, Lieutenant Governor of State of Iowa,

Petitioners,

vs.

ELIZABETH KRUIDENIER, ROBERT R. RIGLER, LAMAR FOSTER, SR., and THOMAS S. HEFLEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Iowa entered in the above entitled case on April 15, 1966.

1. Petitioners are all elected officials of the State of Iowa or Polk County in which the City of Des Moines, the largest city in Iowa, is primarily situated. The duties of petitioners are set forth in the petition (complaint) of respondents. (R. 4-7)

CITATIONS TO OPINIONS BELOW

The Memorandum Opinion, Findings of Fact and Conclusions of Law of the District Court in and for Polk County, Iowa, the court of original jurisdiction, are not reported and are set forth in the Record at pp. 368-404. Such opinion and findings are also appended hereto as Appendix A, infra at pp. A1-A27. The opinion of the Iowa Supreme Court, printed in Appendix B hereto, infra at pp. A28-A72, is reported in 142 N.W.2d 355. The Iowa Supreme Court opinion has not, as of the date of filing this petition, been printed in the official state reporter.

JURISDICTION

The judgment of the Supreme Court of the State of Iowa was entered as of April 15, 1966. Appendix B.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3) (1964). Petitioners did not petition the Iowa Supreme Court for rehearing.

The original petition of the Respondents in Division IV thereof (R. 55-65), challenged the Iowa statute referred to below as violative of the Equal Protection Clause of the Fourteenth Amendment. The counterclaim of the Petitioners here asked the Court to declare such statute, and the reapportionment plan provided for therein, constitutional under the Fourteenth Amendment (R. 116-119). The trial court found such statute constitutional, and was reversed by the State Supreme Court on Fourteenth Amendment grounds.

The petition and both opinions also dealt with the constitutionality of the statute under the Iowa State Constitution. It is the position of the Petitioners that such

2. Reference to this opinion will be made to the appropriate page of Appendix B.

grounds do not constitute a separate and independent ground for decision, thus depriving this Court of jurisdiction. See Reasons for Granting Certiorari, infra at pp. 12-37.

QUESTIONS PRESENTED

1. Whether the 1965 Iowa temporary reapportionment plan, providing for single member and multi-member districts in both House and Senate, where the multi-member districts are created along traditional county lines, is *per se* violative of the Equal Protection Clause of the Fourteenth Amendment.

2. Whether a reapportionment plan which provides for both multi-member districts and single member districts is violative of the Equal Protection Clause of the Fourteenth Amendment because the voters in a multi-member district are entitled to vote for each of the several representatives to be elected from such district, whereas the voter in a single member district is entitled to vote for only one such representative.

   or

   Whether a reapportionment plan which provides for both multi-member districts and single member districts is violative of the Equal Protection Clause of the Fourteenth Amendment even though providing for apportionment between districts on an equal population basis, unless the votes of the voters in a single member district are equivalent to the votes of voters in a multi-member district, in the sense that the weight to be accorded such votes in voting for *the number* of representatives does not exceed the constitutionally permissible variance usually applied to apportionment on a population basis.

3. Whether a finding by a state court, supported only by evidence of the advantages to voter and elected representatives in single member districts, as opposed to multi-member districts, and by evidence that the voter in a multi-member district is enti-

tled to vote for more representatives than a voter in a single member district, is sufficient under the equal protection clause and the due process clause of the Fourteenth Amendment to support, factually, the conclusion that a reapportionment plan providing for both single and multi-member districts invidiously discriminates against either (a) the voter in a multi-member district, or (b) the voter in a single member district.

4. Whether the 1965 reapportionment plan, providing for 11 representatives and 5 senators to be elected at large in Polk County, Iowa, is violative of the Equal Protection Clause because the ballot is long and cumbersome and there are no identifiable constituencies.

STATUTES INVOLVED

The Iowa statutory provision directly involved is Chapter 88, Acts of the 61st General Assembly (Iowa 1965). This statute is reprinted in full in Appendix C, infra at pp. A72-A82.

Also set forth in full in Appendix D, infra at pp. A95-A96, are the following provisions of the Iowa Constitution which Petitioners believe are necessary for a complete understanding of the statute referred to above:

Article I, Section 6.
Article III, Section 37.
Article III, Section 34.
Article III, Section 35.
Article III, Section 36.

STATEMENT OF CASE

On May 10, 1965, Respondents, all registered voters of the State of Iowa (R. 3), commenced this action, attacking the validity of Iowa's 1965 temporary reapportionment plan.[3]

---

3. The petition of the Respondents (the Plaintiffs in the court below) originally attacked the 1964 temporary reapportionment plan. This plan was held prospectively invalid by the

Petitioners filed a special appearance in the District Court attacking the jurisdiction of the State Court because of the existence of a similar class action then pending in

---

Footnote 3 (continued)—

three-man Federal District Court in *Davis* v. *Cameron*, 238 F.Supp. 462 (S.D. Iowa 1965) and was replaced by the statute here under attack. Respondents amended their petition to include an attack on the 1965 plan, which was passed on May 27, 1965. (R. 43-65)

The action was commenced and prosecuted as a class action on behalf of the Respondents and on behalf of all other voters in the State of Iowa similarly situated. (R. 4) See Iowa Rules of Civil Procedure 42 (1962) which is similar to the comparable federal rule.

The petition was originally filed while the Sixty-first General Assembly of the State of Iowa was in session. The attack on the 1964 plan was held as moot by the District Court (R. 397), which finding was not attacked on appeal to the State Supreme Court. Petitioners conceive that the validity of the 1964 plan is not here in question because of this finding, and further because such plan was replaced by the 1965 plan.

The 1965 plan here under attack provides for subdistricting in both House and Senate of the Iowa legislature. The plan is attached as Appendix C, infra at pp. A72-A82. The following is a summary of the Senate plan:

Single member districts	Total population*
42	1,762,833

Multi-member districts	Total population*
7	895,762

All of the multi-member districts consist of one county. In four such districts, two senators are elected; the population of said counties varies from 80,048 (District 30, Dubuque County) to 119,067 (District 15, Scott County). In two such districts, three senators are elected; the population of those counties is 122,482 (District 32, Black Hawk County) and 136,899 (District 24, Linn County). Polk County, in which the city of Des Moines is located, comprises the remaining multi-member district; it is allotted five senators and its population is 266,315.

House of Representatives: The plan provides for 124 representatives in 81 districts.

Single member districts	Total population*
63	1,234,745

Multi-member districts	Total population*
18	1,423,850

the Federal District Court for the Southern District of Iowa in which the Court had retained jurisdiction.[4]

The special appearance was sustained by the trial court (R. 92) which was reversed by the Supreme Court of Iowa upon the interlocutory appeal of Respondents.[5] *Kruidenier* v. *McCulloch*, 136 N.W.2d 546 (Iowa, 1965).

After this decision, Petitioners filed their answer and a counterclaim. The counterclaim was in the nature of a declaratory judgment asking that the 1965 plan be adjudged as a constitutional temporary plan under the then known constitutional standards (R. 116-119).

In their counterclaim these Petitioners alleged ". . . that the controversy between these plaintiffs and these defendants as to the constitutionality of the 1965 temporary reapportionment plan should also involve the real and substantial issue as to whether this plan meets the federal constitutional requirements as to fair representation of voting rights." (R. 117-118).

Footnote 3 (continued)—

Eleven districts, all of which except the eighteenth comprising one county, elect two representatives. One district, consisting of one county, elects three representatives. One district, consisting of one county, elects four representatives. Three districts, each consisting of one county, elect five representatives. One county-wide district elects six representatives. One county-wide district elects eleven representatives.

*Respondents did not attack the population variances of the plan.

4. *Davis* v. *Cameron*, 238 F.Supp. 462 (D.C.S.D. Iowa 1965). The order of the Federal Court in this regard is set forth in the Record at pp. 40-42.

5. After the decision of the Iowa Supreme Court, holding, in effect, that the state court had jurisdiction of this case, the Respondents filed a motion of intervention and were permitted to intervene in *Davis* v. *Cameron*, *supra*, note 3. Thereafter, the intervenors' motion to stay the proceedings of the federal court was granted. (R. 100)

The cause came on for trial before the Polk County District Court on September 30, 1965, the Honorable Harry Perkins presiding. The Respondent's evidence can be summarized as follows:

a. The difficulties in campaigning in Polk County, a multi-member district under both 1964 and 1965 reapportionment plans, as opposed to smaller or single member districts.

b. The difficulties of a voter making intelligent choices in a large multi-member district.

c. Evidence that one Republican representative (the minority party) could have been elected from Polk County if a subdistrict had been laid out in a particular area of Polk County.

d. Evidence of a political scientist, offered as expert evidence, in regard to the desirability of subdistricts generally.

e. Testimony of the same political scientist that the "best plan" for Polk County would be a combination of subdistricts and multi-member districts.

The Petitioners' evidence was offered to show that the 1964 and 1965 plans had a reasonable basis and were good faith attempts to follow the state and federal constitutional requirements. The evidence also indicated that the legislature had the honest belief that subdistricting was prohibited by the Iowa Constitution and that, therefore, the only reasonable alternative to comply with the population requirements of the Equal Protection Clause of the Federal Constitution was to create, in some cases, larger multi-member districts.

On November 5, 1965, the trial court ruled in favor of Petitioners and also sustained their counter-claim. Appendix A, infra at pp. A1-A27. See also R. 368-404.

The Respondents appealed to the Iowa Supreme Court, which, on April 15, 1966, held that:

> ". . . the 1965 temporary reapportionment plan violates section 6, Article I of the Constitution of Iowa and the 14th amendment to the Constitution of the United States." (Appendix B, infra at p. A67).

The Court also indicated as follows:

> "We believe it difficult, if not impossible, to justify constitutionally, a multi-member district in which the ratio of members therein exceeds the variance in population between districts which has been approved by the United States Supreme Court." (Appendix B, infra at p. A67).

As a result of this holding, the trial court's decision on the constitutional issues was reversed. The Iowa Supreme Court retained jurisdiction of the case "to consider prescribing an interim plan of reapportionment providing for subdistricting in Polk County in the event that it becomes apparent that no substantial progress is being made by the Sixty-second General Assembly to provide for such subdistricting."[6] (Appendix B, infra at p. A54).

General Background

In order for the Court to fully appreciate the significance of this case, Petitioners believe that a general statement of the background of the history of reapportionment in Iowa is necessary.

The original Iowa Constitutions of 1846 and 1857 provided for apportionment of both the House and the Senate on a population basis. Included in the apportionment sections of these constitutions is the provision which now appears in Article III, Section 37, as follows:

---

6. The Sixty-second General Assembly will convene in January, 1967.

> "When a congressional, senatorial, or representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial, or representative district."

The Constitution was amended in 1904 to limit the House of Representatives to one representative per county with the nine largest counties getting an extra representative. The 1928 constitution was amended to limit a county to one senator. (The limit of Fifty senators had been established by the 1904 amendment and was retained.) An accurate statement of this history may be found in the opinion of the Iowa Supreme Court, Appendix B, infra at pp. A31-A32.

In 1961 the first apportionment of the State of Iowa in the Twentieth Century occurred and was limited by the amendments of 1904 and 1928 to the constitution. In 1962 the Iowa Supreme Court sustained the apportionment against constitutional attack in *Selzer* v. *Synhorst*, 253 Iowa 936, 113 N.W.2d 724 (1962), despite wide population variances. In May 1963 a three-judge district court in *Davis* v. *Synhorst*, 217 F.Supp. 492 (S.D. Iowa 1963) held that there was malapportionment of the Iowa legislature in violation of the Equal Protection Clause of the United States Constitution.[7]

The federal district court, however, did not order any legislative action because of a then pending constitutional amendment on reapportionment, which subsequently failed.

---

7. For example, at that time, under the 1960 census, Adams County with a population of 7,468 had one house representative, while Polk County, with a population of 266,315, had two representatives.

On January 4, 1964, the three-judge court ruled that three sections of the Iowa Constitution were invalid.[8]

The court, however, held that Article III, Section 37, which prevented the division of a county, was severable from the other provisions and was valid. The court directed the legislature to adopt a temporary plan until new constitutional provisions could be adopted. *Davis* v. *Synhorst*, 225 F.Supp. 689 (S.D. Iowa 1964),[9] aff'd on appeal, *Hill* v. *Davis*, 378 U.S. 565 (1964).

---

8. The three sections are here set forth:

"Sec. 34. The number of senators shall at the next session following each period of making such enumeration, and the next session following each United States census, be fixed by law, and apportioned among the several counties, according to the number of inhabitants in each."

"Sec. 35. The Senate shall not consist of more than fifty members, nor the House of Representatives of more than one hundred; and they shall be apportioned among the several counties and representative districts of the State, according to the number of inhabitants in each, upon ratios to be fixed by law; but no representative district shall contain more than four organized counties, and each district shall be entitled to at least one representative. Every county and district which shall have a number of inhabitants equal to one-half of the ratio fixed by law, shall be entitled to one representative; and any one county containing in addition to the ratio fixed by law, one half of that number, or more, shall be entitled to one additional representative. No floating district shall hereafter be formed."

"Sec. 36. At its first session under this Constitution, and at every subsequent regular session, the General Assembly shall fix the ratio of representation, and also form into representative districts those counties which will not be entitled singly to a representative."

9. The action in the three-judge district court was a class action, although the Respondents here were not named as parties nor did they participate in such action.

Shortly after this decision, the Governor of Iowa convened a Special Session of the General Assembly, which enacted Senate File 1, Acts of the 60th General Assembly, Extraordinary Session (Iowa 1964) (the "1964 Plan"). This plan increased the number of senators from 50 to 59 and increased the number of representatives from 108 to 124. The plan primarily added representatives and senators to the larger counties and combined the smallest counties into senatorial and representative districts. There was no attempt to subdistrict because of the holding in *Davis* v. *Synhorst*, 225 F.Supp. 689 (S.D. Iowa 1964), which upheld the validity of Article III, Section 37, which was then being interpreted to prevent subdistricting. The Plan was an attempt to meet the judicially determined requirements of the Fourteenth Amendment to the federal constitution. The 1964 plan was approved by the three-judge panel in *Davis* v. *Synhorst*, 231 F.Supp. 540 (S.D. Iowa 1964). The opinion of the United States Supreme Court in *Hill* v. *Davis*, supra, had approved the 1964 plan only insofar as that plan was consistent with *Reynolds* v. *Sims*, decided in the interim. In February 1965, and consistent with the holding of *Reynolds*, the three-judge federal court held that the 1964 plan was prospectively null and void and that the legislature, which was then in regular session, should devise a new plan. The court reserved jurisdiction. The legislature then passed what is now Chapter 88, Acts of the 61st General Assembly (Iowa 1965), which is here referred to as the "1965 temporary apportionment plan." The 1965 plan did not change the apportionment plan of the house which the three-judge panel had previously indicated was satisfactory. The Senate plan was revised to obtain a more equal population basis and two additional senators were added. The 1965 plan did not provide for subdistricting.

REASONS FOR GRANTING THE WRIT

The opinion of the Iowa Supreme Court, in reality, is three opinions. In a judgment in which all nine justices concurred, the Court held that after 1966, Polk County had to be subdistricted. The basis of this holding was that, under the circumstances presented, the failure to subdistrict Polk County violated the "equal protection" rights of citizens of Polk County.[10]

In the "majority opinion" of Justice Stuart, in which five justices concurred (Appendix B, infra at pp. A55-A69), the Court further held that the ". . . 1965 temporary reapportionment plan violates Section 6, Article 1 of the Constitution of Iowa and the 14th Amendment to the Constitution of the United States."[11] Appendix B, infra at p. A67.

---

10. Compare the following language from Division XIII of the "minority opinion", the opinion of Justice Mason:

> "The record indicates many of the same objections contained in Lucas, Fortson and Drew, supra, existed in the 1964 Polk County election and will probably continue to exist there unless we direct subdistricting in that county. . . .
>
> While we hold the 1965 temporary reapportionment plan is sufficient for the 1966 elections, this record leads us to the conclusion that in order to provide equal protection of the laws, subdistricting is necessary in Polk County thereafter." Appendix B, infra at pp. A51-A52.

with the following language of Division XIII of Justice Stuart's opinion:

> "We agree with that portion of Division XIII of the principle opinion which holds the 1965 temporary plan denies equal protection to the residents of Polk County." Appendix B, infra at p. A67.

This language, together with a full reading of both opinions on this Question amply justify the conclusion that the Court based its narrow holding on the issue of subdistricting in Polk County, on the federal requirements imposed by Section 1 of the Fourteenth Amendment.

11. The "minority opinion" of Justice Mason seemingly disagrees with this holding:

> "We reject the contention that formation of single-member districts is necessarily required by either section 6, Article 1, of the state constitution, or Section 1, Amendment 14, of the federal constitution."

The Court gave as its primary reason, if not the sole reason, for so holding, the following:

> "The Supreme Court recognized in *Reynolds* v. *Sims*, supra, that mathematical precision was not a workable constitutional requirement. 'So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal population principle are constitutionally permissible.' The same legitimate considerations which would make multi-member districts constitutionally permissible under the Iowa Constitution apply here. We believe it difficult, if not impossible, however, to justify constitutionally, a multi-member district in which the ratio of members therein to a single-member district exceeds the variance in population between districts which has been approved by the United States Supreme Court." Appendix B, infra p. A67.

In other words, the Court was of the opinion and so held that because the 1965 reapportionment plan provided for multi-member districts and single member districts in the same house of a legislature, that, in and of itself, was a violation of the Equal Protection Clause of the Fourteenth Amendment, unless the proponents of the plan, here the Petitioners, made a showing that the ratio of representatives from a multi-member district to a single member district did not exceed the constitutionally permissible variance in population between districts.[12]

It is Petitioners' position that this holding is not in accord with the applicable decisions of this court on the

---

12. Petitioners concede that no such showing was here made. In fact, such ratio varies from approximately two to one to eleven to one.

substantial federal question presented and that, therefore, this Petition should be granted.[13]

The Applicable Decisions of This Court

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), the Court, in dicta, recognized that while a state may legitimately desire to maintain geographic and political subdivisions to provide for flexibility in representative government, the overriding considerations must remain substantial voter equality—the "one-man, one-vote" principle. *Reynolds* further states that one house of a state legislature might contain ". . . at least some. . . ." multi-member districts. Several federal and state courts before and since *Reynolds* have assumed the validity of multi-member districts, and then applied the equal protection requirement to them, an assumption which is reasonable in light of *Reynolds* and one which Petitioners believe to be controlling here.[14]

---

13. Petitioners rely upon each of the three questions set forth under the heading "Questions Presented" for the granting of this writ. However, the discussion here will be limited to a demonstration that the decision of the majority that the 1965 reapportionment plan violated equal protection is clearly not in accord with the applicable decisions of this Court, and the reasons Petitioners feel this case is sufficiently important to justify the granting of this writ.

14. Prior to *Reynolds*, in *Drew* v. *Scranton*, 229 F.Supp. 310 (N.D. Penn. 1964), a three-judge district court held invalid the Pennsylvania apportionment act which provided for two, three and four member districts around single member districts, concluding that absent any legislative history or other justifying reasons, "such districting is either a result of gerrymandering for partisan advantage . . . or it was wholly arbitrary and capricious." After *Reynolds* v. *Sims*, the Pennsylvania Supreme Court in *Butcher* v. *Bloom*, 415 Pa. 438, 203 A.2d 556 (1964), dealing with the same reapportionment plan held that single member districts were more appropriate than multi-member districts in apportionment schemes but admitted that valid and compelling reasons

After *Reynolds*, the Court assumed in *Lucas* v. *Forty-Fourth Colorado General Assembly*, 377 U.S. 713 (1964), the validity of multi-member districts in this language:

> "We do not intimate that apportionment schemes which provide for the at large election of a number of legislators from a county, or any . . . at large election of a number of legislators from a county, or any political subdivision are constitutionally defective. Rather, we merely point out that there are certain aspects of electing representatives at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multi-member counties." 377 U.S. 713, 731 (1964). Footnote 21.

In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), the case which most logically follows in sequence in a discussion of the constitutional status of multi-member districts, the Court was dealing with Georgia's apportionment plan which created for the senate twenty-one multi-member districts in which from two to seven senators were elected, and thirty-three single member districts. The plan was not attacked on a population basis, but rather it was urged that, since a senator was required to be a resident of a subdistrict of a multi-member district, and although he

---

Footnote 14 (continued)—

might require the later arrangements and render them valid. Thereafter, this Court vacated and remanded *Drew* by way of a per curiam opinion, 379 U.S. 40 (1965), citing *Reynolds* and *Butcher*, together with the other intervening decisions of this Court. The Iowa Supreme Court, in arriving at its conclusion that multi-member districts were per se invalid, relied heavily upon *Drew*, and indicated that its reversal was for reasons other than the district court's disapproval of multi-member districts. Although Petitioners do not wish to speculate as to why the Court reversed *Drew*, nonetheless, the case is doubtful authority for the Iowa Court's holding of the per se invalidity of multi-member districts. See also *Davis* v. *Cameron*, 238 F.Supp. 462 (S.D. Iowa 1965); *Stout* v. *Bottorff*, 246 F.Supp. 825 (S.D. Ind. 1965).

was to be voted upon by all the voters of the district, the plan violated equal protection. This Court found that such a plan did not violate equal protection, rejecting as "hypothetical and impractical" petitioner's contention that the voting scheme was mathematically capable of nullifying the unanimous choice of the voters of any subdistrict of its choice of senator. Again, this Court recognized that multi-member districts would be permissible, although the opinion was careful to point out that the creation of multi-member districts which, in fact, would minimize or cancel out the voting strength of racial or political elements might be violative of the Equal Protection Clause.

Thus, in *Reynolds*, *Lucas*, and *Fortson*, supra, the Court recognized the validity of apportionment plans which provided for both multi-member and single-member districts. In fact, prior to Fortson, in the only case which disapproved the use of multi-member districts, the Court reversed.[15] Nonetheless, it was clear from these three opinions, that under some circumstances a multi-member district which designedly, or otherwise, subverted racial and political elements, might be violative of the Equal Protection Clause of the Fourteenth Amendment.[16]

The last case to reach the Court involving the validity of multi-member districts was *Burns* v. *Richardson*, 34 U.S.L.W. 4365 (1966). In reversing the holding of a three-judge district court's decision that Hawaii's temporary reapportionment plan was violative of equal protection, the court said as follows:

---

15. See *Drew* v. *Scranton*, 229 F.Supp. 310 (N.D. Penn. 1964), reversed, 379 U.S. 40 (1965).

16. cf., *Wright* v. *Rockfeller*, 376 U.S. 52 (1964).

"Where the requirements of *Reynolds* v. *Sims* are met, apportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown that 'designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case would operate to minimize or cancel out the voting strength of racial or political elements of the voting population'.

"It may be that invidious effect can more easily be shown if, in contrast to the facts in *Fortson*, districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if subdistricts characterize both houses of a bicameral legislature rather than one. But the demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record. Cf. McGowan v. Maryland, 366 U.S. 420. That demonstration was not made here. In relying on conjecture as to the effects of multi-member districting rather than demonstrated fact, the court acted in a manner more appropriate to the body responsible for drawing up the districting plan. Speculations do not supply evidence that the multi-member districting was designed to have or had the invidious effect necessary to a judgment of the unconstitutionality of the districting. Indeed, while it would have been better had the court not insisted that the legislature 'justify' its proposal, except insofar as it thus reserved to itself the ultimate decision of constitutionality vel non, the legislature did assign reasons for its choice. Once the District Court had decided, properly, not to impose its own senate apportionment but to allow the legislature to frame one, such judgments were exclusively for the legislature to make. They were subject to constitutional challenge only upon a demonstration that the interim apportionment, although made on a proper population basis, was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 34 U.S.L.W. 4365 at 4369 (1966).

The sole factual basis which the Iowa Supreme Court relied upon to reach its conclusion that the 1965 reapportionment plan violated the Equal Protection Clause of the Fourteenth Amendment is summarized in the Statement of Case, supra at pp. 4-11. Petitioners believe that this evidence fails to support the conclusion that the plan invidiously discriminates against citizens of Polk County, within the test set forth in *Burns* v. *Richardson*, supra.

Petitioners also believe that the decisions of this Court referred to above hardly justify the conclusion of the Iowa Supreme Court that:

> it . . . /is/ . . . difficult, if not impossible . . . to justify constitutionally, a multi-member district in which the ratio of members therein to a single member district exceeds the variance in population between districts which has been approved by the United States Supreme Court.

This holding is at odds with the dicta of *Reynolds* and *Lucas*, supra, and the holding of *Fortson* and *Burns*. Indeed, Petitioners have been able to find no case law by any court and no other authority which supports this novel proposition.[17]

---

17. Since *Fortson*, supra, and *Burns* v. *Richardson*, supra, the Court has considered other multi-member districting cases, but solely on records, briefs and per curiam opinions. At least three of such cases have significance here, however. In *Burnett* v. *Davis*, and its companion, *Thornton* v. *Davis*, 86 S. Ct. 181 (1965), the Court affirmed the holding of a three judge district court that the Fourteenth and Fifteenth Amendments were not violated by a multi-member district consisting of the City of Richmond, Virginia, and contiguous Henrico County, despite the fact that the arrangement might prevent Negro and rural voters in the County from electing Negro and rural representatives, respectively. Petitioners deem these two cases almost identical with the facts presented here. In *Yancey* v. *Faubus*, 251 F.Supp. 998 (D.C. Ark. 1965), affirmed, 86 S. Ct. 933 (1966), the Court affirmed the

It is therefore submitted, that the decision of the Iowa Supreme Court that a reapportionment scheme which provides for single member and multi-member districts in both houses of a bicameral legislature is violative of the Equal Protection Clause of the Fourteenth Amendment, is clearly in conflict with the applicable decisions of this Court. It is further submitted that this case meets the requirements of Rule 19 of the Rules of this Court with regard to the considerations governing review on certiorari.

Footnote 17 (continued)—

holding of a three judge district court upholding, on constitutional grounds, the Arkansas reapportionment plan. The plan provides for multi-member districts and single member districts in both the house and senate. The district court said:

> In attacking the plan the objecting parties contend generally that in creating multi-county and multi-member districts for both Houses the Board acted unconstitutionally, and that the Board's adherence to county lines in creating the respective districts created such disparities of population among the several districts as to violate the "one man, one vote" philosophy of the Reapportionment cases. Id. at pp. 1000-1001.
>
> * * *
>
> We first consider and reject the contention that the plan is automatically unconstitutional because both Houses will consist in part of multi-member and multi-county districts. We see nothing unconstitutional about legislative districts, whether a House district or a Senate district, consisting of more than one county, or about a county containing more than one legislative district. Id. at p. 1001.

In *Swann* v. *Adams,* (S.D. Fla., March 18, 1966) upon remand from a reversal of its previous decision (Swann v. Adams, 86 S. Ct. 767 (1966)), the three judge district court upheld the validity of the proposed Florida reapportionment plan. In so doing the Court stated:

> Finally, the proposed plan contains several multi county, multi representative or multi senator districts. However unwise and undesirable these may be, we find nothing in their nature that violates the federal constitution. See Fortson v. Dorsey, supra.

The Non Federal Basis of the State Court Decision

All nine Justices of the Iowa Supreme Court concurred in the opinion that subdistricting was required in Polk County because, under the circumstances presented, the failure to subdistrict was violative of the equal protection rights of the citizens of Polk County guaranteed to them by Section 1 of Amendment 14 to the Federal Constitution. Appendix B, infra at pp. A50-A53 and p. A67.

It is Petitioners' position that the narrow holding of the Court that the failure to subdistrict Polk County was violative of equal protection was based squarely on federal grounds and is, therefore, reviewable by this Court.

The Iowa Supreme Court decided the first "Question Presented" not only on the basis of its interpretation of the equal protection clause of the Fourteenth Amendment[18] to the United States Constitution, but also on the similar section of the Iowa Constitution which provides as follows:

> "All laws of a general nature shall have uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Article 1, Section 6, Iowa Constitution (1962).

In the specific language of the Court:

> ". . . [we hold] . . . that any scheme of legislative apportionment in which there are multi-member districts and single member districts impairs the right of a resident of a single member district to have the laws operate uniformly as guaranteed by Section 6, Article 1 of the [State] Constitution." Appendix B, infra at page A57.

---

18. "We therefore hold that the 1965 temporary reapportionment plan violates . . . the 14th Amendment to the Constitution of the United States." Appendix B, infra at page A67.

If the judgment of the state court was alternatively based upon its interpretation of the Iowa Constitution, and if this non-federal basis for its judgment is adequate to support the decision of the Iowa Court, Petitioners concede that this Court should not review the question presented.[19]

If the judgment of the state court, however, was based solely on its interpretation of the federal constitution,[20] ". . . or the State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution. . . ."[21] then this Court would have

---

19. See *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935); *Berea College* v. *Kentucky*, 211 U.S. 45, 53 (1908). See also *Herb* v. *Pitcairn*, 324 U.S. 117 (1945) (125-26). ("The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.")

Petitioners are also cognizant that this principle is so firm that even if the Petition here made be granted, the Court may dismiss at a later time if it finds that the foregoing principle applies. It is for this reason that some space is here devoted to Petitioner's views that the non-federal basis for the decision does not preclude the court from reviewing the question presented. Cf., *Wilson* v. *Loew's, Inc.*, 355 U.S. 597 (1958). In this connection, see *Mental Hygiene Dept.* v. *Kirchner*, 380 U.S. 194, 196 (1965).

20. *Mental Hygiene Dept.* v. *Kirchner*, 380 U.S. 194, 196 (1965).

21. Id.

jurisdiction to review the federal question presented.[22] Moreover, if the decision of the state court on the non-federal question is not broad enough,[23] or adequate enough[24] to support its judgment, this court could review the federal question presented. Finally, if the judgment on the non-federal question is not tenable, in the sense that it is "unreasonable",[25] or "without any fair or substantial support"[26] or so "certainly unfounded that it may properly be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question. . . ."[27] this Court has jurisdiction to review the federal question presented despite the presence of a ground for the decision of the state court which would otherwise be sufficient to support its judgment.

---

22. Ibid. See also *State Tax Commission* v. *Van Cott*, 306 U.S. 511, 514 (1939).

> "If the [state court] were only incidentally referring to decisions of this Court in determining the meaning of the state law . . . this Court would have no jurisdiction to review the question. But, if the state court did in fact intend alternatively to base its decision upon the state statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of state law." *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935).

23. *Murdock* v. *Memphis*, 87 U.S. (20 Wall) 590, 636 (1875).

24. *Enterprize Irrig. Dist.* v. *Farmer's Mutual Canal Co.*, 243 U.S. 157, 163-64 (1917).

25. *Vandalia R.R.* v. *Indiana ex rel. City of South Bend*, 207 U.S. 359, 367 (1907).

26. *Ward* v. *Board of County Comm'rs*, 253 U.S. 17, 22 (1920).

27. *Enterprize Irrig. Dist.* v. *Farmer's Mutual Canal Co.*, 243 U.S. 157, 165 (1917). In this connection see Note, The Untenable Nonfederal Ground in the Supreme Court, 74 Harv. L. Rev. 1375 (1961).

A.

The decision of the state court that subdistricting was required by its constitution was either compelled by its interpretation of the Equal Protection Clause of the Fourteenth Amendment, or was not broad enough to support its decision.

Since 1846, there has been no subdistricting in Iowa, presumably because of Article III, Section 37, of the Iowa Constitution which provides:

> ". . . no county shall be divided in forming a congressional, senatorial, or representative district."

Contrary to prior interpretations of this Article,[28] the Iowa Supreme Court, in an opinion in which all nine justices concurred, held this section permitted, but did not compel subdistricting. The reason assigned for the holding was that the interpretation urged by the Petitioners that the Section prevented the subdistricting of a county, ". . . would violate the equal protection clause of Section 1 of the Amendment 14 of the federal constitution." The Iowa court selected its interpretation in line with the recognized rule that when a statutory or constitutional provision can be interpreted in two ways, one of which is constitutional and one of which is not, the former interpretation should be adopted. See Appendix B, infra at page A38.

---

28. It was assumed by the legislature in enacting both the 1964 and 1965 interim apportionment plans that this section prevented subdistricting. See Statement of Case, supra p. 11. The three judge district court also made the same assumption. *Davis v. Synhorst*, 225 F.Supp. 689 (S.D. Iowa 1964). It is for this reason that the plan here under attack made provision for multi-member districts. See Opinion of the Hon. Harry Perkins, Appendix A, infra at p. A16.

Apart from the present case, all of the prior case law decided under provisions similar to the section of the Iowa Constitution here under consideration holds that such provision prohibits subdistricting of a county. See *White* v. *Anderson,* 394 P.2d 333 (Colo. S. Ct. 1964); *Stout* v. *Bottorff,* 246 F.Supp. 825 (S.D. Ind. 1965); *Baker* v. *Carr,* 247 F.Supp. 629 (M.D. Tenn. 1965); *Williams* v. *Carr,* (Tenn. S. Ct. May 16, 1966) (not yet reported in either official or unofficial reports); *Sims* v. *Baggett,* 247 F.Supp. 96 (M.D. Ala. 1965).

In *White* v. *Anderson,* supra, at 337, the court indicated its reasons for adopting the interpretation urged by these petitioners and rejected by the Iowa Court in the following language:

> "It is common knowledge that constitutions of other states were considered by the convention in framing our constitution. At least one of those constitutions expressly provided that a portion of one county could not be added to another to form a district, while other constitutions being considered had the same complete interdictions against division of counties which appears in our constitution. If the framers of our constitution intended to only prohibit the division of a county for the purpose of joinder to another county, they had before them the exact language necessary to accomplish that purpose. That our constitutional convention did not adopt that language but chose instead words which clearly provided that a county shall not be divided in formation of a district has significance; it is persuasive of the fact that it did not want single counties to form multiple districts.
>
> Moreover, in states whose constitutions contain a phrase providing that no county shall be divided in the formation of a district amendments to those constitutions have been enacted permitted the provision of counties before any legislative division of such counties into so-called subdistricts has been made. See,

e.g., the constitutions of California, Connecticut, Michigan, Missouri, North Carolina, and Oregon."

When this language and reasoning is compared to the reason given by the Iowa court for its conclusion that Article III, Sec. 37 permits subdistricting, strong support is given to Petitioner's conclusion that the Iowa Court was compelled to interpret such decision in light of their erroneous interpretation of the 14th amendment's equal protection clause. The opinion of the Iowa Court states, for instance:

> "Further, if section 37, Art. III were construed to prohibit subdistricting of a single county where such subdistricting is necessary to provide equal protection of the laws . . . it would violate section 1 of Amendment 14 of the Federal constitution." Appendix B, infra at p. A38.

In the court's language:

> Further, if section 37, Article III, were construed to prohibit subdistricting of a single county where such subdistricting is necessary to provide equal protection of the laws . . . it would violate the equal protection clause of section 1 of Amendment 14 of the federal constitution. Since the federal constitution is, of course, supreme, such a construction of section 37 would render it of no effect.
>
> . . . .
>
> Under the construction we give section 37, Article III, of our own constitution there is no violation of the equal protection of Amendment 14. Appendix B, infra at pages A38-A39.

The Court also indicated that such interpretation was compelled by Article I, Section 6, of the Iowa Constitution. Appendix B, infra at page A38. But in so doing, the Court neither discussed the historical basis for this pro-

vision or the substantial body of case law and authority which is available to explain the presence of such a provision within a state constitution.[29] Indeed, the only substantial reason given for such interpretation is that the United States Supreme Court requires it.

Once the Court had arrived at the conclusion that Article III, Section 37, had to be interpreted to mean that subdistricting was permissible because of the federal equal protection clause, the Court was then logically bound to reach the conclusion that it did reach; that the 1965 Iowa reapportionment plan violated federal equal protection because it did not provide for subdistricting. Although the Court lost its unanimity on this particular issue[30] the majority opinion still ". . . leaves the impression that the Court probably felt constrained to rule as it did because of [this court's decisions applying the 14th amendment]," *Minnesota* v. *National Tea Co.*, 209 U.S. 551, 554-55, or "because it felt under compulsion of federal law as enunciated by this Court so to hold," *Missouri ex rel. South R. Co.* v. *Mayfield*, 340 U.S. 1, 5, with the result that the state and federal grounds are "so interwoven that [petitioners] are unable to conclude that the judgment rests upon an independent interpretation of state law. *State Tax Comm'n*

---

29. At least 4 other states have provisions which are substantially similar to Art. III, Section 37 of the Iowa Constitution. See Art. IX, Sec. 197-203, Constitution of Alabama; Art. V, Sec. 47, Constitution of Colorado; Art. 4, Sec. 6, Constitution of Indiana; Art. II, Sec. 6, Constitution of Tennessee.

30. The majority opinion on this issue is the opinion of Justice Stuart. Appendix B, infra at pp. A55-A69.

v. *Van Cott*, 306 U.S. 511, 514." *Jankovitch* v. *Toll Road Comm'n*, 379 U.S. 487, 492 (1965).[31]

The decision of the Iowa Court that Article I, Section 6, of its Constitution requires subdistricting is not tenable since it is without fair or substantial support, or "so certainly unfounded that it may properly be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question."

Apart from the physical structure of the opinion, the fact that the Court cites no case law or authority for its position that the 1965 plan violates Article I, Section 6, this holding is contrary to the prior holdings of the court in interpreting the constitutional provision.

---

31. The physical structure of the opinion itself is strong indication that the court was compelled by what it believed to be the Court's interpretation of the 14th Amendment's equal protection clause to hold that the Iowa Constitution both permitted and compelled subdistricting. For example, the decision holding the plan violative of the state constitution, while it precedes the holding on the federal ground, is but one page long as compared to the seven pages of the opinion devoted to the federal holding. The decision on state grounds cites no case law and no authority for its position. In fact, nothing but federal decisions are cited in the majority opinion, other than the decision of the Pennsylvania Supreme Court in *Butcher* v. *Bloom*, 415 Pa. 438, 203 A.2d 556 (1964).

In addition, the court gives no reasons for holding the plan unconstitutional under the state constitution than to reiterate and expand upon the reasons given in its holding that the plan is violative of equal protection. In fact, the phrase "equal protection" seems to have been used by the court in its opinion whether it is referring to the Iowa Constitution or the first section of the 14th Amendment. Compare Appendix B, infra at pp. A55-A57 with pp. A57-A67. In this connection see *Irwin* v. *Doud*, 359 U.S. 394 (1959), where the majority of the Court found that the state court had decided a Federal issue, and that a state ground of decision did not preclude review. The physical structure of the opinion, and the language of the state court strongly argued against their conclusion. See dissenting opinion of Frankfurter, J., 359 U.S. at 407-412.

The Iowa case law interpreting Article I, Section 6, prior to this case was identical with the Federal interpretation of the equal protection clause.[32] That interpretation was best stated in *Steinberg-Baum & Co.* v. *Countryman*, 247 Iowa 923, 77 N.W.2d 15 (1956), as follows:

> It is fundamental that this constitutional provision /Sec. 6 of Article I, supra/ does not require that all laws shall apply alike to all citizens of the State. It is sufficient if a statute applies equally to all members of a class, provided the classification is not purely arbitrary but rests upon some reasonable basis. It is equally settled that the Legislature has wide discretion in determining the classes to which its Acts shall apply.

---

32. Petitioners are not mindful of the dicta in *Minn.* v. *National Tea Co.*, 209 U.S. 551 (1940), to the effect that "in this type of case we deem it essential that this procedure be followed. It is possible that the state court employed the decision under the federal constitution merely as persuasive authorities for its independent interpretation of the State constitution. If that were true, we would have no jurisdiction to reverse.", nor of this court's holding in *New York City* v. *Central Savings Bank*, 306 U.S. 661, in which this Court dismissed a state appeal which involved an interpretation of a city ordinance under the due process clauses of both the state and federal constitutions, which were identical.

Any fair reading of the state court's opinion in this case, however, either indicates that the state court was compelled by its erroneous interpretation of the federal law to reach its decision on the state issue, or it grounded its decision on the state issue to prevent review by this court. In this connection, see *Flourney* v. *Wiener*, 321 U.S. 253 (1944) (". . . where a decision under state law necessarily involves the construction or validity of federal law the determination of such federal law in the application of state law gives rise to a federal question for review.") See also, Note, Supreme Court Disposition of State Decisions Involving Non-Federal Questions, 49 Yale L. Jr. 1463, 1465ff (1940); Hart & Wechsler, the Federal Courts and Federal System, 443 (The Foundation Press, Inc. 1953)

> Classification to meet the requirements of the Constitution must be based upon something substantial—something which distinguishes one class from another in such a way as to suggest the reasonable necessity for legislation based upon such classification.

In light of this statement, which is consistent with other holdings of the Iowa Court,[33] the statement of the Iowa court in this case that ". . . we must examine the temporary plan to determine if it has equal protection between these two classes and whether one has privileges and immunities not available to the other. . ."[34] is difficult to understand. Under the prior Iowa case law, the real issue is whether the difference in treatment between the two classes (i.e., voters in a single member district and voters in a multi-member district) is reasonable, not whether such treatment was equal. Indeed, this court in *Burns* v. *Richardson*, 34 U.S.L.W. 4365 (April 1966), has emphasized this notion by requiring a showing that the effect of the difference in treatment between districts was designed to or does subvert a political or racial minority.

There appears no reason why the prior interpretation of this Iowa Constitutional section should be different in reapportionment cases, other than the fact that it is compelled by this Court's interpretation of the 14th amendment's equal protection clause. In fact, the Iowa Court,

---

33. "Article III, section 30, and Article I, section 6, of our state constitution, invoked by the plaintiff, require that the law in question have a uniform operation throughout the state. The effect of section 1, Fourteenth Amendment to the Constitution of the United States, as applied to this is substantially the same as these uniformity provisions of our own constitution. (citing cases)." *Dickinson* v. *Porter*, 240 Iowa 393, 400, 35 N.W.2d 66, 69 (1949).

34. Appendix B, infra at page A56.

as late as 1962, implicitly approved this interpretation in a state reapportionment case.[35]

In *Fox River Paper Co.* v. *Railroad Comm'n*, 274 U.S. 651 (1927), this court, in referring to the state ground for decision said:

> "In so holding it does not appear that the court ran counter to any established rule of property of the state. An examination of the earlier state decisions discloses no such conflict of authority or inconsistency of judicial opinion on this subject as even to suggest that the court below adopted its view in order to evade the constitutional issue."

Petitioners here contend that an examination of the Iowa case law does reveal such inconsistency, and with this fact, and the fair reading of the opinion, it is clear

---

35. In *Selzer* v. *Synhorst*, 253 Iowa 936, 113 N.W.2d 724 (1962), the Iowa court did not require "equal voting power" of each citizen. The language of the court is quite specific:

> "Because of the change in district boundaries and designation, the voters in seven counties who helped elect Senators in 1960 for four-year terms will, in 1962, be helping elect Senators in their new district for four-year terms. Following the 1962 election a voter in one of these counties could say (if he had voted for successful candidates) that he had voted for and was accordingly represented by two Senators. It is not unusual for a voter to have such an opportunity. It frequently happens when a voter moves from one district to another between elections. The idea that we are personally represented and represented only by officials for whom we have voted stretches too far the theory of representative government. In some states our incumbent President did not receive a majority vote. In Washington, D.C., the residents did not vote at all. The President, however, is still the President of all the people." 253 Iowa at 947-948, 113 N.W.2d at 730.

The reapportionment plan referred to had wide population variations. It should be noted that at the time the Iowa Court decided *Selzer*, supra, the "one man, one vote" principle of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), had not been expressed by this Court.

that the Iowa Court adopted this view of its own constitutional provision to preclude this Court from reviewing the federal question it decided so erroneously.[36]

Other factors which compel Petitioners to believe that the decision of the state court on the question of the violation of its state constitution is untenable and designed to preclude review of the federal question include:

1. The court's failure to apply the presumption of constitutionality which legislative acts are ordinarily entitled to. This presumption has been recognized by the Iowa court on innumerable occasions, and was applied by the District Court Judge who decided this case in the trial court. In the language of that judge:

> "That there is a strong presumption of constitutionality of constitutions and statutes. The plaintiffs have not overcome this strong presumption by presenting evidence of the wisdom of alternative apportionment plans or by pointing out hardships in campaigning or by evidence that it does not create perfect equality." Appendix A, infra at p. A22.

2. The court's complete lack of reference to the findings of the trial court,[37] inconsistent with its own local rule of practice which entitles such findings to "weight",[38] and the failure of the court to rely upon facts supported

---

36. For other cases where this court has looked to state decisions to determine whether the state ground of decision was adequate, see *Utley* v. *St. Petersburg*, 292 U.S. 106, 111 (1934), and *Woods* v. *Nierstheimer*, 328 U.S. 211 (1946). See generally, Note, The Untenable Nonfederal Ground in the Supreme Court, 74 Harvard Law Review, 1375, 1385 (1961).

37. Appendix A, infra at pp. A15-A27.

38. Iowa R. Civ. P. 344(7) (1962).

by the record in arriving at its conclusion that the 1965 plan failed to operate uniformly.[39]

3. The fact that in arriving at its opinion the court split along partisan lines, the majority consisting of the party out of power, which would theoretically benefit most by subdistricting.

Because of the foregoing, it is submitted that the holding of the court that the 1965 interim reapportionment plan violated Article I, Section 6,[40] is not an "independent and adequate state ground for decision", which would preclude this court from reviewing the question presented. That holding is better characterized as either unreasonable, arbitrarily, or "so clearly unfounded that it may properly be regarded as essentially arbitrary, or a mere device to prevent review of the decision upon the federal question."[41]

The Importance of Granting the Writ

The holding of the State Court that a reapportionment plan which provides for multi-member and single

---

39. There was no evidence at all offered to support the majority's conclusion:

> "that much legislative work is done by committees and there is a distinct advantage in having one's own representative sitting as a member of a committee considering legislation in which one has an interest. . . . Particularly in personal interest legislation, the residents of Polk County have an unfair and unequal advantage over the residents of Warren County or of any other single member district. He has a much greater opportunity to find legislators to espouse his cause and a much greater chance that one or more of his representatives will be on the committee to which his legislation is assigned. His voting power is much greater."

40. Appendix B, infra at p. A67.

41. *Enterprize Irrig. Dist.* v. *Farmer's Mutual Canal Co.*, 243 U. S. 157, 164 (1917).

member districts violates the Equal Protection Clause of the Fourteenth Amendment unless the ratio of members in a multi-member district does not exceed ". . . the variance in population between districts which has been approved by the United States Supreme Court," is contrary to the applicable decisions of this Court. And while the Iowa Court did not have the benefit of this Court's holding and opinion in *Burns* v. *Richardson*[42] before it when the instant case was decided, we deem that opinion controlling here.

However, it is the Petitioners' position that the doctrine announced in *Burns* v. *Richardson* is a reaffirmation of the doctrine that had been previously set out in the cases of *Reynolds* v. *Sims*, supra, and *Fortson* v. *Dorsey*, supra, both of which pointed out that weighted voting in a multi-member district would meet the constitutional requirements of equal population representation.

This case was the first opportunity that the Iowa Supreme Court was presented with the question of the constitutionality of any of the temporary plans for reapportionment since *Baker* v. *Carr*. The question as to the validity of such plans had been handled by a Federal three-judge district court. We acknowledge that it has been held to be useful and desirable that a State Supreme Court intervene into this area. We do, however, believe that it is necessary and desirable that the decisions of this Court be correctly applied. It is for this basic reason that this petition should be granted, and for the further basic reason that the constitutional voting rights of the citizens of Iowa be correctly determined.

While the Iowa Court, in its holding, permits the use of the 1965 plan under attack for this fall's election, the

---

42. 34 L.W. 4365 (April 25, 1966).

legislature will be required, under the Court's opinion, to deal with the problem of subdistricting along the guidelines set down by the Court as constitutional principles, which lines are highly arbitrary and at best questionable, both from a political viewpoint and as a matter of "equal protection." The Iowa Court had always previously recognized the right of the legislature to classify. The Iowa Court had always given the legislature wide discretion in this regard, recognizing that the Iowa legislature was a coordinate branch of government. Population had always been a recognized classification factor.[43]

The present Chief Justice of the Iowa Supreme Court stated in *Dickinson* v. *Porter* at page 401 of the Iowa Reports that "it is not sufficient that the court may regard the reason for classification a poor one." Chief Justice Garfield further stated that the Iowa Supreme Court will not interfere "unless the plaintiff has proven the classification does not rest on a reasonable basis but is essentially arbitrary and palpably discriminating." The burden of proof in showing the unconstitutionality of a statute had always been on the party claiming unconstitutionality.[44]

The desirable features, politically, of single member districts were discussed by this Court in *Lucas* v. *Colorado Forty-Fourth General Assembly* and found by the Iowa court as proper matters to consider in arriving at its decision.[45] Indeed, other arguments can be and have

---

43. See, *e.g.*, *State ex rel. Wright* v. *Board of Health*, 233 Iowa 872, 10 N.W.2d 561 (1943); *Dickinson* v. *Porter*, 240 Iowa 390, 35 N.W.2d 66 (1949).

44. *Dickinson* v. *Porter*, 240 Iowa 393, 35 N.W.2d 66 (1949); *Faber* v. *Loveless*, 249 Iowa 593, 88 N.W.2d 112 (1958).

45. It should be noted that the language in the *Lucas* case is only in regard to the *desirability*, rather than the *constitutionality*, of multi-member districts.

been advanced in favor of single member districting.[46] On the other hand, this Court (and political scientists) have recognized that considerations involving the economic and social factors in historical development of districts mitigate against single member districting. In addition, many of the reapportionment cases recognized the desirability of preserving the political identity of governmental subdivisions which is implemented by multi-member districts. But the considerations in favor and against single versus multi-member districting have been treated by the Court, and rightly so, as problems for the legislature[47] and the political scientists. They are considerations which can be best set forth and resolved through legislative, rather than judicial, action. In every sense of the word, the problem is one of politics and of political science, rather than one of constitutional law.

Any inflexible constitutional requirement of single member districts[48] such as was adopted by the Iowa Court

---

46. Note the district court's reasons as set out in *Burns* v. *Richardson*, supra.

47. Justice Brennan in *Burns* v. *Richardson*, supra, stated at 34 L.W. 4366 in a footnote that: "It is the distribution of legislators rather than the method of distributing legislators that must satisfy the demands of the Equal Protection Clause."

48. At least the following states have temporary or permanent reaportionment plans which provide for multi-member and single member districts to both houses of their bicameral legislatures:

Alaska	California	Maine
Arkansas	Colorado	North Dakota

At least the following states have temporary or permanent reapportionment plans providing for single and multi-member districts in one house of their bicameral legislatures:

Arizona	Mississippi	South Dakota
Florida	Missouri	Texas
Kansas	New Jersey	Vermont
Maryland	New Mexico	Washington
Michigan	Ohio	

See *generally*, McKay, Reapportionment, Appendix (Twentieth Century Fund, Inc. 1965).

encourages the delineation of districts as purely political bases, regardless of other group interests. This Court, by permitting the use of multi-member districts if the votes are of approximately equal numerical weight,[49] absent evidence of intentional or designed submersion of recognizable group interests, as last has created the strong possibility of flexibility in maintaining present political subdivisions as the basic units of representations. At the same time, this Court has delineated the duty and power of the court reviewing the particular plan.

Justice Mason in writing what is in part a minority opinion held that Polk County, the eleven member House district, contained "the objections to multi-member districts as set out in *Lucas, Fortson* and *Drew,* supra . . . to the point where there is invidious discrimination leading to the conclusion that equal protection rights are violated. . . ." Justice Mason further held that "in order to provide equal protection of the laws subdistricting is necessary in Polk County. . . ." The majority opinion writer agreed with Justice Mason's opinion "which holds the 1965 temporary plan denies equal protection to the residents of Polk County." On this point we have a nine to nothing decision.

In regard to the rest of the state, the decision of the Iowa Court was five to four on the question as to whether the rest of the state should be subdistricted and was split along partisan lines with the majority comprising the party out of power. The majority writer used essentially political arguments to justify his belief that the existence of single member and multi-member representative districts in the same house of the legislature was per se unconsti-

---

49. See *Reynolds* v. *Sims,* supra, and *Burns* v. *Richardson,* supra.

tutional. This opinion writer ignored the existing body of Iowa law and, of course, did not cite any Iowa authority. We have pointed out in our brief that very little of the opinion dealt with the court's reasons and that when the majority discussed the federal grounds, extensive treatment was made.

It is the Petitioners' contention that such novel doctrines of law, which are contrary to the established precedents of both the Supreme Court of Iowa and the Supreme Court of the United States, deprive the Petitioners of due process of law.

The Petitioners firmly believe that *Burns* v. *Richardson,* supra, as well as *Reynolds* v. *Sims,* supra, and *Fortson* v. *Dorsey,* supra, properly remove from the judicial sphere those questions which the Iowa Court answered with novel doctrines. The Iowa Court entered a legislative arena. The Iowa Court entered a political arena.

Petitioners submit that this Court has jurisdiction and should exercise it to cure the misstatements of the federal voting rights of the citizens of Iowa.

Respectfully submitted,

.....

LAWRENCE F. SCALISE
Attorney General of Iowa

.....

TIMOTHY MCCARTHY
Solicitor General of Iowa
State of Iowa